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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

-vs-

BILLY JOE FLANNIGAN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Arizona Court of Appeals decided that, when there is probable cause to believe that a person was driving while under the influence of an intoxicating substance, the police must take the time to attempt to obtain a telephonic warrant before drawing the person's blood to preserve evidence of intoxication. This holding, which decides an important question of federal constitutional law, is in conflict with the decision of this Court in *Schmerber v. California*, 384 U.S. 757 (1966), with decisions of courts of last resort in other states, and with decisions of United States Courts of Appeal. Accordingly, this petition for a writ of certiorari presents the following question:

When there is probable cause to believe that a person has been driving while under the influence of an intoxicating substance, does the evanescent quality of the substance in the person's blood provide sufficient exigent circumstances by itself to permit the police to draw the person's blood without first attempting to obtain a telephonic search warrant?

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OPINION BELOW

On November 3, 1998, the Arizona Court of Appeals, holding that the Fourth Amendment requires that the police should have obtained a warrant before drawing Respondent's blood, reversed the trial court's denial of the motion to suppress and remanded the case. *See State v. Flannigan*, 978 P.2d 127 (Ariz. Ct. App. 1998). A copy of the opinion of the Arizona Court of Appeals is at Appendix A. The Arizona Supreme Court denied Respondent's petition for review. A copy of the order denying the petition for review is at Appendix B. A copy of the mandate issued by the Arizona Court of Appeals is at Appendix C.

STATEMENT OF JURISDICTION

Petitioner respectfully requests that a Writ of Certiorari issue to review the decision of the Arizona Court of Appeals. On November 3, 1998, the Arizona Court of Appeals issued its decision. (Appendix A.) On May 26, 1999, the Arizona Supreme Court denied the petition for review. (Appendix B.) Petitioner timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a); and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

Procedural History of the Case

On January 12, 1995, the State of Arizona charged Respondent with one count of manslaughter for recklessly causing the death of Kathleen

Brant, one count of aggravated assault for using a dangerous instrument to recklessly cause physical injury to Jason Rippey, and one count of endangerment for recklessly endangering Jeff Brant with a substantial risk of imminent death.

Before trial, Respondent filed a motion to suppress the results of blood-testing. Respondent argued that, to comply with the Fourth Amendment, the police should have obtained a telephonic warrant before drawing his blood for testing. Respondent asserted that *Schmerber v. California*, 384 U.S. 757 (1966), was distinguishable because telephonic search warrants had not been available in that case. Respondent also asserted that *State v. Cocio*, 709 P.2d 1336 (1985), was distinguishable. In *Cocio*, the Arizona Supreme Court, citing *Schmerber*, held that, when there is probable cause to believe that a driver is under the influence of alcohol, the drawing of the driver's blood for medical purposes, and its subsequent use by the police to detect the presence of alcohol, is permissible under the Fourth Amendment.

After taking evidence on the issue, the trial court denied the motion to suppress. The trial court stated:

> [T]he issue still goes back[,] in my opinion[,] to whether or not the fact that telephonic search warrants can be obtained dictates a reevaluation, if you will. Maybe not a reversal, but a reevaluation of *Schmerber* and *State [v.] Cocio*. And the Court declines to so show.
>
> The Court does rule that *State [v.] Cocio* would still support a warrantless taking of blood in a situation where a stimulant is suspected. It is not possible to determine, according to the officer doing the testing, which stimulant. That it could be a stimulant such as cocaine, which with a half-life . . . that is less than alcohol, and that delay . . . may cause a loss of the detectability of that drug or other illegal substance.
>
> There is one other aspect of this. The fact that in some cases a warrant can be obtained in 15 to 35 or 45 minutes doesn't mean that it doesn't sometimes take longer. And the time lost in trying to find a magistrate and not getting through is additional lost time. So if the officer got on the phone and spent another 35 to

40 minutes looking for a magistrate, that is additional lost time that causes the presence of the suspected drug to perhaps dissipate and become undetectable.

The Court does find therefore that *State [v.] Cocio* is still applicable to the withdrawing of blood without a warrant in a situation where there is probable cause to believe that the defendant has been involved in a felony such as manslaughter or aggravated assault.

The case proceeded to trial by jury. On July 3, 1997, the jury convicted Respondent of negligent homicide, aggravated assault, and endangerment. On August 12, 1997, the trial court sentenced Respondent to concurrent terms of imprisonment of 4.5, 7.5, and 2 years.

Respondent then appealed the convictions to the Arizona Court of Appeals. On November 3, 1998, the Arizona Court of Appeals reversed the convictions, ruling that the trial court had erred by denying the motion to suppress the results of the blood-testing. The Arizona Court of Appeals stated:

In *Schmerber*, exigent circumstances existed because of the evanescent quality of alcohol *and* because the police reasonably believed that they did not have time to "seek out a magistrate and secure a warrant" before evidence of the defendant's intoxication would be destroyed. *Schmerber* does not provide a blanket exception to the warrant requirement whenever a suspect is believed to be under the influence of alcohol or drugs. Rather, the evanescent quality of alcohol and drugs in a person's body creates an exigency only if the evidence might disappear before the police can obtain a warrant. . . .

The record does not suggest that the police reasonably believed that evidence of Flannigan's drug consumption would disappear from his system before they could obtain a warrant. Rather, as the officers readily admitted, they did not seek a warrant because they had been instructed that exigent circumstances *always* exist in vehicular manslaughter or aggravated assault cases in which a person is suspected of driving

under the influence of drugs or alcohol. This is not the rule of *Schmerber*.

The Arizona Court of Appeals then observed that the police could likely have obtained a telephonic warrant in no more than 45 minutes. Further, a criminalist had testified that, in view of Respondent's condition at the police station, such a delay likely would not have prevented the detection of the intoxicant in Respondent's blood. After acknowledging the possibility that more delay might have occurred, the court ruled:

> The mere possibility of delay does not give rise to an exigency. By contrast, if the police had attempted to obtain a warrant but had encountered difficulties in reaching the magistrate, this change in circumstances might well have created an exigency justifying the warrantless seizure of defendant's blood.

Finally, after alluding to evidence that methamphetamine and cocaine metabolites can be detected in urine 12 to 24 hours after ingestion, the Arizona Court of Appeals concluded that drawing Respondent's blood had not been necessary to convict him of the charged offenses.

Petitioner sought review in the Arizona Supreme Court, arguing that the Arizona Court of Appeals had misconstrued *Schmerber*. Petitioner asserted that, under *Schmerber*, when there is probable cause to believe that a driver's blood contains an intoxicating substance, the evanescent nature of the substance in the driver's blood by itself gives rise to exigent circumstances supporting a warrantless drawing of blood. On May 26, 1999, the Arizona Supreme Court summarily denied the petition for review.

Facts of the Case

On August 18, 1994, at about 11:13 a.m., in Mesa, Arizona, Respondent, driving a flatbed tow truck carrying a disabled car, ran a red light and collided with a car driven by Kathy Brant and carrying two children, Jeff Brant and Jason Rippey. Kathy Brant was killed, and both children were injured, Rippey seriously and Jeff Brant not so seriously. Paramedics who treated Respondent at the scene noticed that both his pulse rate and blood pressure were elevated. When they tested him again 25 minutes later, both measurements were still elevated. They also noticed that

Respondent appeared to be nervous. Officer Martinez, a drug recognition expert, investigated the accident, and noticed that Respondent was jittery and restless. A police officer transported Respondent to the police station.

At the police station, beginning at about 12:54 p.m., Officer Martinez began a Drug Recognition Evaluation (DRE) of Respondent. Because the policy of the Mesa Police Department required the participation of two drug recognition experts, Sergeant Bradley also observed the evaluation. The DRE consisted of several tests of Respondent's physical coordination, a breath test, and a horizontal gaze nystagmus (HGN) test. Respondent had difficulty performing the tests for physical coordination. The breath test revealed no sign of alcohol. The results of the HGN test were normal. The DRE also included repeated monitoring of Respondent's pulse rate, blood pressure, and temperature, all of which remained elevated throughout the evaluation. The officers also observed that Respondent's nostrils were red. Respondent told the officers that he had taken four Vivarin tablets at approximately 7:00 p.m. the previous evening and that he had consumed three 52-ounce drinks of Mountain Dew or Coca-Cola the morning of the accident.

Both Officer Martinez and Sergeant Bradley concluded that Respondent was under the influence of a central-nervous-system stimulant. Officer Martinez placed Respondent under arrest and requested that he give a blood sample. A phlebotomist drew Respondent's blood at the police station at approximately 1:52 p.m.. A toxicology screen of the blood detected the presence of amphetamine and methamphetamine.

At trial, Respondent testified that he could not be certain about the source of the amphetamine and methamphetamine in his blood, but that, 1 or 2 days before the accident, he had taken tablets that had been described to him as "over-the-counter Mexican speed."

The Mesa Police Department had not sought a telephonic search warrant before drawing Respondent's blood. The policy of the Mesa Police Department was to obtain such warrants before drawing the blood of impaired drivers only when the offense did not involve death or serious physical injury. Such warrants may ordinarily be secured in 15 to 45 minutes; however, obtaining such a warrant may take longer because of difficulties in reaching a judge or magistrate.

A criminalist, Thomas Simonick, testified that, when a person exhibits symptoms similar to those that Respondent was exhibiting, a delay of 15 to 45 minutes before drawing blood would ordinarily not prevent the detection of stimulants in the blood. However, Simonick later qualified this testimony, stating that it is impossible to know how long a substance will remain in the blood without knowing the nature of the substance. Simonick further testified that it is desirable to draw blood as near in time as possible to the impaired driving, because the body continuously metabolizes stimulants in the blood, causing them to disappear.

Petitioner presented expert testimony on the characteristics of various intoxicants. Physical signs of impairment do not reliably distinguish among various kinds of stimulants. The effects of cocaine may last from 1 to 2 hours. The effects of methamphetamine may last from 4 to 8 hours. The average half-life of cocaine in a persons's blood is 1 to 2 hours, and the average half-life of methamphetamine in a person's blood is 6 to 15 hours. Alcohol remains in the blood for a longer period than cocaine and for a shorter period than methamphetamine. Cocaine metabolite may be detected in the urine for as long as 12 to 24 hours. Methamphetamine metabolite may be detected in the urine for as long as 24 to 48 hours. Simonick testified that the presence of cocaine or methamphetamine metabolites in the body does not imply that the person would show signs of impairment or, specifically, be impaired in the ability to react.

REASONS WHY THE WRIT SHOULD ISSUE

THE ARIZONA COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION OF THIS COURT, OF COURTS OF LAST RESORT IN OTHER STATES, AND OF UNITED STATES COURTS OF APPEALS.

This Court should grant this petition for a writ of certiorari because the Arizona Court of Appeals, in its decision in this case, decided an important federal question in a way that conflicts with the decision of this Court in *Schmerber v. California*, 384 U.S. 757 (1966). Further, this decision of the Arizona Court of Appeals conflicts with decisions reached by courts of last resort in other states. *See State v. Baker*, 502 A.2d 489 (Me. 1985); *State v. Bohling*, 494 N.W.2d 399 (Wis. 1993). It also conflicts with decisions reached by United States Courts of Appeals. *See United States v. Reid*, 929

F.2d 990 (4th Cir. 1991); *United States v. Berry*, 866 F.2d 887 (6th Cir. 1989).

More specifically, this Court held in *Schmerber* that, provided there is probable cause to believe that a person was driving while impaired by an intoxicant, the evanescent quality of the intoxicant in the driver's blood by itself provides exigent circumstances supporting a warrantless taking of blood. The decision of the Arizona Court of Appeals in this case, by requiring the presence of exigent circumstances beyond the evanescent quality of the intoxicant in the blood, directly conflicts with *Schmerber*'s holding.

A. *SCHMERBER V. CALIFORNIA.*

In *Schmerber*, this Court addresses the issue whether the warrantless taking of a driver's blood violates the Fourth Amendment when there exists probable cause to believe that the driver was under the influence of alcohol. As in Respondent's case, *Schmerber* involves a person who had an accident when driving while under the influence of an intoxicating substance. A police officer at the scene observed signs that Schmerber was impaired by alcohol, including the smell of an alcoholic beverage on his breath and watery, bloodshot eyes. Because Schmerber suffered injuries in the accident, he was taken to a hospital. At the hospital, at the direction of the police officer, a physician withdrew a sample of Schmerber's blood, and, upon analysis, this blood was found to contain a level of alcohol indicative of intoxication. These test results were introduced in evidence at Schmerber's trial for driving while under the influence of intoxicating liquor. *Schmerber* finds that probable cause existed to arrest the driver for driving while under the influence of intoxicating liquor. 384 U.S. at 768.

Schmerber then takes up the question whether the officer should first have obtained a search warrant. "Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." 384 U.S. at 769. *Schmerber* concludes that a qualifying emergency was present in that case:

> The officer in the present case . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence," *Preston v. United*

> *States*, 376 U.S. 364, 367, 84 S. Ct. 881, 883 11 L.Ed.2d 777 [1964]. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

Id. at 770–71. *Schmerber* further holds that the taking of blood was a reasonable procedure under the circumstances and that it was performed in a reasonable manner. *Id.* at 771.

Schmerber describes its holding as follows:

> We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today told that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Id. at 772.

B. THE ARIZONA COURT OF APPEALS ERRED IN CONCLUDING THAT RESPONDENT'S CASE IS DISTINGUISHABLE FROM *SCHMERBER*.

Contrary to the holding of the Arizona Court of Appeals in this case, this case is not factually distinguishable from *Schmerber*. There was probable cause to believe that Respondent had been driving while under the influence of an intoxicating substance, and an emergency presented itself requiring the immediate drawing of Respondent's blood. The justifying emergency in Respondent's case was the same as the one in *Schmerber*. In

both cases, the driver's blood was drawn because the intoxicating substance was being eliminated from the blood and any significant delay in drawing the blood could mean that significant evidence of intoxication would be irretrievably lost. Further completing the parallel, the drawing of Respondent's blood was a reasonable procedure that was performed in a reasonable manner.

Despite the factual similarity between Respondent's case and *Schmerber*, the Arizona Court of Appeals declined to follow *Schmerber*, and instead narrowed *Schmerber*'s holding beyond this Court's intent. The state appellate court attempted to distinguish *Schmerber* on a couple of bases. The court observed that the police in Respondent's case could have tried to obtain a telephonic search warrant, and further that they likely could have obtained one in less than 45 minutes. Acknowledging that a longer delay could have occurred, the court conceded that such a delay might then have provided an exigency justifying a warrantless search. In seeking to distinguish *Schmerber*, the court also observed that there was not much need to draw Respondent's blood because cocaine and methamphetamine metabolites are detectable in urine many hours after ingestion.

This attempt to distinguish *Schmerber* is predicated on a misunderstanding of *Schmerber*. *Schmerber* authorizes a warrantless drawing of blood when there is probable cause to believe that the driver is under the influence of an intoxicating substance. In searching for exigent circumstances sufficient to dispense with the warrant requirement, *Schmerber*'s gaze wanders no further than the presence of an intoxicating substance in the blood of a driver. Under *Schmerber*'s holding, it is irrelevant in determining the presence of exigent circumstances whether a procedure is available for obtaining telephonic warrants, or how long it might take to obtain a telephonic warrant, or whether a process for obtaining biological evidence of intoxication without drawing blood was available. Rather, *Schmerber* only requires that the driver's blood contain an intoxicating substance that is vanishing.

Respondent's case illustrates the wisdom of *Schmerber*'s holding, because any effort to obtain a telephonic warrant would have presented a significant risk of loss of significant evidence of intoxication. The evidence reflected that telephonic search warrants may usually be obtained in 15 to 45 minutes, but sometimes more time is needed. Any delay within this range would have entailed a significant risk of loss of significant evidence.

The police did not know what intoxicants Respondent had in his blood. They believed that these intoxicants were stimulants, but they did not know which ones, and different stimulants are eliminated from the blood at varying rates. Further, the police did not know how long ago Respondent had ingested the stimulants or in what quantities. Accordingly, the police did not know how close Respondent was to point where the stimulants would no longer be detectable in his blood. While it may have been likely, as Simonick testified, that these stimulants would have been detectable for another 45 minutes in light of the signs of intoxication exhibited by Respondent, such an assumption would have been no more than risky conjecture without knowing more particulars about the substance and its use, as Simonick suggested. Further, because metabolites remain in the body for such long periods, evidence of metabolites in a driver's urine is not as strongly probative of impaired driving as is evidence that the driver's blood contained an intoxicating substance. As Simonick testified, a person with methamphetamine or cocaine metabolite in the body might not show any signs of its presence and might not have an impaired ability to react.

In sum, Respondent's case is not distinguishable from *Schmerber*, and the Arizona Court of Appeals, under the guidance of *Schmerber*, should have affirmed the trial court's denial of the motion to suppress the results of the blood-testing. By failing to follow *Schmerber*, the Arizona Court of Appeals decided an important federal question about the application of the Fourth Amendment in a way that conflicts with an opinion of this Court.

C. THE HOLDING OF THE ARIZONA COURT OF APPEALS CONFLICTS WITH DECISIONS IN OTHER JURISDICTIONS.

The decision of the Arizona Court of Appeals in this case conflicts with decisions reached by courts of last resort in other states. *See State v. Baker*, 502 A.2d 489 (Me. 1985); *State v. Bohling*, 494 N.W.2d 399 (Wis. 1993). It also conflicts with decisions reached by United States Courts of Appeals. *See United States v. Reid*, 929 F.2d 990 (4th Cir. 1991); *United States v. Berry*, 866 F.2d 887 (6th Cir. 1989).

1. *Conflicts with Courts of Last Resort in Other States.*

The decision in Respondent's case conflicts with the holding of the Wisconsin Supreme Court in *Bohling*. In that case, blood was drawn without benefit of a warrant from a driver who had properly been arrested

for driving while under the influence of alcohol. *Bohling* directly confronts the same question that this petition for a writ of certiorari presents to this Court:

> The issue in this case is whether the fact that the percentage of alcohol in a person's blood stream rapidly diminishes after drinking stops alone constitutes a sufficient exigency under the Fourth Amendment to the United States Constitution and Article I Section 11 of the Wisconsin Constitution, to justify a warrantless blood draw under the following circumstances: (1) the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a drunk-driving related violation or crime, and (2) there is clear indication that the blood draw will produce evidence of intoxication.

494 N.W. 2d at 399–400. *Bohling* answers the issue thus:

> Applying this standard, we hold that under the foregoing circumstances the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw.

Id. at 400.

Bohling begins its discussion by stating, "*Schmerber* is the starting point of our analysis." *Id.* at 402. *Bohling* then recognizes that *Schmerber* is susceptible of two possible interpretations:

> *Schmerber* can be read in two ways: (a) that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation or crime—as opposed to taking a blood sample for other reasons, such as to determine blood type; or (b) that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of two hours until arrest, constitute exigent circumstances for such a blood draw.

Id. Bohling decides that the first alternative is correct:

> We believe that the more reasonable interpretation of *Schmerber* is the first one set forth—exigency based solely on the fact that alcohol rapidly dissipates in the bloodstream.

Id. *Bohling* further explains the policy considerations motivating its interpretation of *Schmerber*:

> We also note that our interpretation of *Schmerber* makes sense from a policy standpoint. It strikes a favorable balance between an individual's right to be free from unreasonable searches and Wisconsin's interest in enforcing its drunk driving laws. Wisconsin's interest is vital whereas the resulting intrusion on individual privacy is minimal.

Id. at 405.

Bohling is not distinguishable from Respondent's case on the basis that *Bohling* involved alcohol intoxication while this case concerns intoxication by amphetamine and methamphetamine. The nub of *Bohling* is not that the intoxicating substance was alcohol, but rather that the intoxicating substance, which just happened to be alcohol, was rapidly being eliminated from the driver's blood. In Respondent's case, the officers believed that Respondent was under the influence of a stimulant. The stimulant could have been cocaine, which dissipates in blood more quickly than alcohol. Or it could have been amphetamine or methamphetamine, which dissipate in blood more slowly than alcohol. Accordingly, in Respondent's case as in *Bohling*, the driver's blood contained an intoxicating substance that was being eliminated and approaching the point where it could not be detected, and the officers could not know when that point would arrive.

The decision in Respondent's case also conflicts with the decision of Maine Supreme Court in *Baker*. Baker was convicted of manslaughter after killing his passenger when driving while under the influence of alcohol. Over Baker's objection, an officer drew a sample of his blood for alcohol testing. Citing *Schmerber*, *Baker* concludes that the officer properly drew the driver's blood. *Baker* states that, under *Schmerber*, the "constitutional prerequisites to admission of the results of the blood test administered over defendant's objection . . . are probable cause to search and exigent circumstances justifying the execution of that search without a warrant." 502 A.2d at 493. *Baker* holds:

> The Superior Court did not address the existence of adequate justification for such a warrantless search, finding only the existence of probable cause to believe that defendant was under the influence of intoxicating liquor at the time of the accident. However, having held this finding by the Superior Court to be amply supported by the record, . . . we are satisfied that from this single finding may be inferred probable cause for a search of defendant's blood and exigent circumstances requiring that the search be conducted promptly.

502 A.2d at 493. *Baker* further explains its holding that probable cause to believe that a driver is intoxicated implies an exigency justifying the warrantless drawing of blood:

> The bodily process that eliminates alcohol also provides exigent circumstances obviating the need to obtain a warrant prior to administering a blood test.

Id. Similarly, in Respondent's case, probable cause to believe that Respondent had been driving while under the influence of stimulants engendered exigent circumstances justifying the warrantless drawing of his blood.

Moreover, the decision of the Arizona Court of Appeals in Respondent's case is contrary to decisions reached by state courts in cases other than *Bohling* and *Baker*. *See, e.g.*, *Municipality of Anchorage v. Ray*, 854 P.2d 740, 750 (Alaska Ct. App. 1993) (upholding drawing blood from non-consenting impaired driver; finding that a blood test is not "materially more intrusive" than a breath test; ruling that need for a test of blood alcohol is greater when someone has been injured or killed); *State v. Schauer*, 501 N.W.2d 673, 675 (Minn. Ct. App. 1993) (finding exigent circumstances to draw blood because "evidence of intoxication dissipates rapidly"); *State v. Lerette*, 858 S.W.2d 816, 819 (Mo. Ct. App. 1993) (ruling that there were exigent circumstances to draw blood because the "percentage of alcohol in the bloodstream diminishes with time and . . . the delay caused by having to obtain a warrant might result in the destruction of evidence"); *Tipton v. Commonwealth*, 444 S.E.2d 1, 3 (Va. Ct. App. 1994) (finding that "exigent circumstances existed due to the dissipating nature of alcohol in blood").

On the other hand, the decision of the Arizona Court of Appeals finds support in decisions reached by other state courts. *See, e.g., People v. Fiscalini*, 279 Cal. Rptr. 682, 685 (Cal. Ct. App. 1991) (ruling that *Schmerber* did not support drawing blood from impaired driver who had already given a urine sample); *People v. MacCallum*, 925 P.2d 758, 764 (Colo. 1996) (finding exigent circumstances in passage of time when injured driver was taken to the hospital while officers remained at the scene to complete investigation).

2. *Conflict with United States Courts of Appeal.*

The decision in Respondent's case is also contrary to the result reached by United States Courts of Appeals in *Reid* and *Berry*.

While *Reid* involves the administration of a breathalyzer test rather than the drawing of blood, *Reid* has special pertinence to Respondent's case because it responds to the claim that alcohol testing should not be performed without a warrant when a process exists for obtaining a telephonic warrant. In *Reid*, the Fourth Circuit Court of Appeals, deciding two consolidated cases, concludes that the officers were not required to try to obtain a telephonic warrant before administering a breathalyzer test to an apparently impaired driver. *Reid* bases its conclusion on *Schmerber*:

> One exception to the warrant requirement for a reasonable search under the Fourth Amendment occurs when there are exigencies in a situation which make exemption from the warrant requirement "imperative." *New York v. Belton*, 453 U.S. 454, 457, 101 S. Ct. 2860, 2862, 69 L.Ed.2d 768 (1981). Exigent circumstances were present in *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 768 (1981).

929 F.2d at 993. *Reid* further explains:

> In *Skinner* [*Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 109 S. Ct. 1402 (1989)], the Supreme Court reiterated the notion that time is of the essence when there is a need to test alcohol in the body when it stated that "the delay necessary to procure a warrant nevertheless may result in the destruction of evidence." 489 U.S. at 623, 109 S. Ct. at 1416.

Id. In rejecting the claim that the officers should have tried to obtain telephonic warrants in accord with the rules governing the issuance of such warrants, *Reid* states:

> Obviously, compliance with these rules takes time. Time is what is lacking in these circumstances.
>
> > [A]lcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible.
>
> *Skinner*, 489 U.S. at 623, 109 S. Ct. at 1416.

Id. Reid further explains that "[d]runk driving is a grave problem in society today." *Id. Reid* ends its discussion by observing that breathalyzer testing is "less intrusive" than drawing blood, and that this Court in *Skinner* upheld blood testing.

> Society has a recognized interest in protecting its citizens from drunk drivers. Breathalyzer tests cause a lesser intrusion than blood tests. Time is of the essence when testing for alcohol in the bloodstream. The combination of these factors sets out exigent circumstances which are sufficient to require that the police be allowed to test drunk drivers without first having to obtain a warrant.

Id. at 994.

In *Berry*, the Sixth Circuit Court of Appeals, citing *Schmerber*, concludes that the police had properly drawn blood from an impaired driver. *Reid* explains its result as follows:

> We believe . . . that *Schmerber* can be read as an application of the exigent circumstances exception to the warrant requirement. There the facts creating probable cause to arrest also established that the results of the blood test would prove positive. The Court concluded that because the accuracy of the test diminishes with time, and because it would take some time for

> the officer to investigate and find facts establishing probable cause, there would be no time reasonably to expect the officer to obtain a warrant.

866 F.2d at 891.

However, the decision reached by the Arizona Court of Appeals finds support in the decision of the Ninth Circuit Court of Appeals in *Nelson v. Irvine*, 142 F.3d 1196, 1204–05 (9th Cir. 1998), which rules that the exigency for drawing blood from an impaired driver ends when other means of obtaining biological evidence become available.

CONCLUSION

Because the Arizona Court of Appeals decided an important federal question in a way that conflicts with *Schmerber*, with decisions of courts of last resort in other states, and with decisions of United States Courts of Appeal, Petitioner respectfully requests this Court to grant the petition for writ of certiorari and resolve this conflict regarding an important issue of federal constitutional law.

Respectfully submitted,

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CRM97-1452
100373

APPENDICES

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Division One
Court of Appeals
State of Arizona
Filed: Nov -3, 1998

GLEN D. CLARK, CLERK
By: J. Eisenhart

STATE OF ARIZONA Appellee, v. BILLY JOE FLANNIGAN, Appellant.	)	1 CA-CR 97-0763 DEPARTMENT A OPINION

Appeal from the Superior Court of Maricopa County

Cause No. CR 95-90117

The Honorable Mark F. Aceto, Judge

REVERSED AND REMANDED

Grant Woods, Attorney General by Paul J. McMurdie, Chief Counsel, Criminal Division and Gregory A. McCarthy, Assistant Attorney General, Attorneys for Appellee. Phoenix

Dean W. Trebesch, Maricopa County Public Defender by Christopher V. Johns, Deputy Public Defender, Attorneys for Appellant. Phoenix

GERBER, Judge.

¶ 1 Billy Joe Flannigan ("Flannigan") appeals his convictions and sentences for negligent homicide, aggravated assault and endangerment. Because we conclude that the trial court erred in denying his motion to suppress the results of a warrantless blood test, we reverse Flannigan's convictions and remand to the trial court for further proceedings.

FACTS (FN1)

¶ 2 The charges against Flannigan arise from an automobile accident in Mesa, Arizona on August 18, 1994. The undisputed evidence at trial established that he drove a flatbed tow truck through a red light and struck another automobile in the intersection, killing the driver of the other vehicle and injuring her two teenage passengers, one of them seriously.

¶ 3 The paramedics who treated Flannigan after the accident observed that both his blood pressure and pulse rate were high. When they tested him again approximately twenty-five minutes later, both rates remained high. They also observed that he was very nervous throughout the time that they attended him.

¶ 4 After conferring with the paramedics, Mesa Police Officer Ron Martinez spoke to Flannigan. Martinez, a certified drug recognition expert, noticed that he was "jittery" and manifested finger tremors. With Flannigan's consent, Martinez had another officer drive him to the police station so that he could perform a series of field sobriety tests.

¶ 5 Martinez met Flannigan at the station and read him his *Miranda* warnings. (FN2) Beginning at 12:54 p.m., approximately one and one-half hours after the accident, Officer Martinez began a Drug Recognition Evaluation ("DRE") of Flannigan. Pursuant to a policy of the Mesa Police Department which required that two drug recognition experts participate in all DREs, Sergeant Patricia Bradley also observed the evaluation. The DRE consisted of several tests of his physical coordination, a breath test, and a horizontal gaze nystagmus ("HGN") test. It also included repeated monitoring of his pulse rate, blood pressure and temperature, all of which remained elevated throughout the evaluation. Additionally, the officers observed that Flannigan's nostrils were red, a possible indication that he had ingested a drug. He told the officers that he had taken four Vivarin tablets at approximately 7:00 p.m. the previous evening and that he had

consumed three 52-ounce drinks of Mountain Dew or Coca-Cola the morning of the accident.

¶ 6 Believing that Flannigan was under the influence of a central nervous system stimulant, Officer Martinez arrested him and requested that he give a blood sample. The record does not indicate that he consented, nor did Officer Martinez or Sergeant Bradley obtain a warrant for the blood draw. Nevertheless, a phlebotomist drew his blood at the Mesa police station at 1:52 p.m. A toxicology screen detected the presence of amphetamine and methamphetamine in his blood.

¶ 7 The Maricopa County Grand Jury subsequently indicted Flannigan on one count each of reckless manslaughter, aggravated assault pursuant to Arizona Revised Statutes Annotated ("A.R.S.") section 13-1204(a)(2) upon a victim under fifteen years of age, and endangerment. A jury convicted him of aggravated assault, endangerment and negligent homicide as a lesser-included offense of manslaughter. The jury also found each felony to be a dangerous offense involving the use of a motor vehicle as a dangerous instrument in violation of A.R.S. section 13-604(P) (1994).

¶ 8 The trial court sentenced him to mitigated, concurrent terms of 4.5 years for negligent homicide, 7.5 years for aggravated assault and 2 years for endangerment. (FN3) He timely appealed his convictions and sentences to this court. We have jurisdiction over his appeal pursuant to article VI, section 9 of the Arizona Constitution and A.R.S. sections 12-120.21 (1992), 13-4031 (1989), and 13-4033(A)(Supp.1997).

DISCUSSION

I. MOTION TO SUPPRESS BLOOD TEST RESULTS

¶ 9 Prior to trial, Flannigan moved to suppress the results of his blood test, arguing that the warrantless seizure of his blood violated the Fourth Amendment because it was non-consensual and not otherwise justified by the presence of exigent circumstances. Officer Martinez and Sergeant Bradley testified at the suppression hearing that Flannigan's DRE indicated that he was under the influence of a central nervous system stimulant. Pursuant to Mesa Police Department procedure in all traffic accident cases involving serious injury or death, the officers did not attempt to obtain a warrant before conducting the blood draw. Instead, they relied on the

department's policy that exigent circumstances always exist in vehicular aggravated assault and manslaughter cases. They conceded that it was possible to obtain a telephonic search warrant in fifteen to forty-five minutes, although the process can take longer.

¶ 10 Thomas Simonick, the Mesa Police Department criminalist who tested Flannigan's blood sample, testified that drugs, like alcohol, are evanescent in a person's blood system. Cocaine remains in the blood system for less time than alcohol, while methamphetamine remains in the blood for a longer period than alcohol. Specifically, methamphetamine has a half-life in blood of six to fifteen hours, while cocaine's half-life in blood is one to two hours. Methamphetamine metabolites, however, may be detected in urine for approximately twenty-four to forty-eight hours and cocaine metabolites may be detected in urine for approximately twelve to twenty-four hours. According to Simonick, it is impossible to tell by observing whether a person is under the influence of cocaine or methamphetamine. He also testified that, if a person is exhibiting physical symptoms caused by a stimulant (as Flannigan did throughout the DRE), a delay of fifteen to forty-five minutes in obtaining a blood sample probably would not preclude a criminalist from detecting evidence of the stimulant in the blood.

¶ 11 The trial court denied Flannigan's motion to suppress, concluding that the blood draw was constitutionally reasonable under the exigent circumstances exception to the warrant requirement, as that exception is explained in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). He maintains that the trial court erred in this conclusion.

¶ 12 In reviewing the denial of Flannigan's motion to suppress, we must defer to the trial court's factual findings absent an abuse of discretion. *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996). We review de novo the ultimate issue whether the warrantless blood draw complied with the dictates of the Fourth Amendment. See *id.*, see also *State v. Blackmore*, 186 Ariz. 630, 632, 925 P.2d 1347, 1349 (1996); see *Schmerber*, 384 U.S. at 767, 86 S.Ct. 1826 (taking of blood sample is a search subject to the warrant requirement of fourth amendment).

¶ 13 At the outset, we note that this case does not involve an application of the Arizona implied consent statute in effect at the time of the

arrest. See A.R.S. § 28-691 (1994). The implied consent statute in effect in 1994 would have applied only if the police had arrested Flannigan for a violation of the Uniform Act Regulating Highway Traffic, see A.R.S. Title 28, Chapter 6. See A.R.S. § 28-691(A) (1994). He was arrested for violating provisions of Title 13 of the Arizona Revised Statutes, not Title 28.

¶ 14 Similarly, because he did not sustain any injuries in the accident that required medical personnel to draw his blood, this case does not involve the medical purposes exception of A.R.S. section 28-692(J), which would have entitled the police to receive a sample of his blood regardless of his consent. See A.R.S. § 28-692(J) (1994); see also *Lind v. Superior Court*, 191 Ariz. 233, 236, 954 P.2d 1058, 1061 (App.1998).

¶ 15 The state argues for the first time on appeal that the warrantless seizure of Flannigan's blood was constitutionally permissible because he consented to it. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)(consent to search constitutes exception to warrant requirement); *State v. Groshong*, 175 Ariz. 67, 70-71, 852 P.2d 1251, 1254-55 (App.1993). The state waived this argument for purposes of appeal because it never attempted to prove consent at the suppression hearing.

¶ 16 Moreover, even absent waiver, we would reject the state's argument because the record lacks evidence of Flannigan's actual consent to the blood draw. "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) (citations omitted); see also Ariz. R.Crim. P. 16.2(b)("The prosecutor shall have the burden of proving, by a preponderance of the evidence, the lawfulness in all respects of the acquisition of all evidence which the prosecutor will use at trial."). At most, the record demonstrates only that Flannigan never expressly refused to submit to the blood draw. This evidence is insufficient to demonstrate actual consent.

¶ 17 Absent express consent to the blood draw, the police would have been entitled to conduct the warrantless seizure of his blood only if (1) they

had probable cause to believe that he had been operating his vehicle while under the influence of drugs, and (2) exigent circumstances justified dispensing with the warrant requirement. Because we conclude that the state failed to prove exigent circumstances, we hold that the police violated Flannigan's Fourth Amendment rights when they conducted the warrantless blood draw.

¶ 18 The United States Supreme Court first recognized the "exigent circumstances" exception to the warrant requirement in upholding the warrantless seizure of a DUI suspect's blood in *Schmerber v. California*. 384 U.S. at 770-72, 86 S.Ct. 1826. The defendant in *Schmerber* was charged with driving while under the influence of alcohol. *Id.* at 758, 86 S.Ct. 1826. The police arrested him while he was receiving treatment at a hospital for injuries he sustained in an automobile accident. *Id.* Without first obtaining a warrant or consent from the defendant, the police directed the treating physician to draw a sample of the defendant's blood for purposes of measuring his blood alcohol content.

¶ 19 In upholding the validity of the warrantless search, the Supreme Court concluded that the police had probable cause to believe that the defendant had been driving while under the influence of alcohol. The critical question was whether the police acted reasonably in obtaining the blood sample without a warrant. The Court's reasoning for permitting a warrantless search in that case is helpful here:

> The officer in the present case ... might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence," *Preston v. United States*, 376 U.S. [364], 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.
>
> 384 U.S. at 770-71, 86 S.Ct. 1826 (emphasis added).

¶ 20 In *Schmerber*, exigent circumstances existed because of the evanescent quality of alcohol and because the police reasonably believed that they did not have time to "seek out a magistrate and secure a warrant" before evidence of the defendant's intoxication would be destroyed. *Schmerber* does not provide a blanket exception to the warrant requirement whenever a suspect is believed to be under the influence of alcohol or drugs. Rather, the evanescent quality of alcohol and drugs in a person's body creates an exigency only if the evidence might disappear before the police can obtain a warrant. The Court emphasized this point in *Schmerber*:

It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid minor intrusions into an individual's body under stringently limited circumstances in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

384 U.S. at 772, 86 S.Ct. 1826 (emphasis added).

¶ 21 The record does not suggest that the police reasonably believed that evidence of Flannigan's drug consumption would disappear from his system before they could obtain a warrant. Rather, as the officers readily admitted, they did not seek a warrant because they had been instructed that exigent circumstances always exist in vehicular manslaughter or aggravated assault cases in which a person is suspected of driving under the influence of drugs or alcohol. This is not the rule of *Schmerber*.

¶ 22 The record establishes that the Mesa Police Department is able to obtain a warrant within as little as fifteen minutes and that delays of only fifteen to forty-five minutes are commonplace. Nevertheless, believing that a warrant was not required, neither Officer Martinez nor Sergeant Bradley made any attempt to obtain a telephonic warrant. Flannigan still manifested physical symptoms of methamphetamine or cocaine consumption when the officers completed the DRE. The Mesa Police Department's criminalist testified that a delay of fifteen to forty-five minutes in obtaining a blood sample probably would not have precluded a criminalist from detecting evidence of the stimulant in his blood.

¶ 23 We recognize the possibility that the police might have encountered longer delays had they attempted to obtain a warrant and that the evidence does not prove conclusively that a warrant would have issued in fifteen to forty-five minutes. We do not know how long the delay would have been because the police made no effort whatsoever to obtain a warrant. The mere possibility of delay does not give rise to an exigency. By contrast, if the police had attempted to obtain a warrant but had encountered difficulties in reaching a magistrate, this change in circumstances might well have created an exigency justifying the warrantless seizure of defendant's blood.

¶ 24 Of course, a blood test was not the only viable method by which the police could have obtained evidence of Flannigan's drug use. The suppression hearing testimony revealed that methamphetamine and cocaine use can be detected in a suspect's urine for as long as twelve to forty-eight hours after ingestion. Although the record does not indicate whether urinalysis would have enabled a criminalist to determine the precise amount of drugs in his system when the accident occurred, such evidence would not have been necessary to convict him of the charged crimes.

¶ 25 In any event, having conducted the fact-intensive analysis *Schmerber* requires, we conclude that the state did not meet its burden of proving the presence of exigent circumstances. The officers' rote application of the department's untenable policy that exigent circumstances always exist in vehicular manslaughter and aggravated assault cases violated Flannigan's right to be free from unreasonable search and seizure. The trial court therefore erred in refusing to suppress the results of the blood test. (FN4)

II. CLASS 2 FELONY AGGRAVATED ASSAULT

¶ 26 Flannigan also argues that the trial court erred in its interpretation of A.R.S. section 13-1204(B) when it sentenced him for aggravated assault as a class 2, rather than a class 3, felony. Although we reverse his convictions, we address this additional issue because it may arise again in the new trial.

¶ 27 The state indicted him for aggravated assault as a class 2 felony, and the trial court sentenced him accordingly. Although he failed to raise the issue before the trial court, he argues on appeal that, whenever a

defendant is convicted of aggravated assault involving reckless, as opposed to intentional or knowing, conduct, section 13-1204(B) imposes an arbitrary enhancement of the defendant's punishment. Specifically, section 13-1204(B) provides that an aggravated assault involving serious physical injury or the use of a deadly weapon or dangerous instrument is a class 3 felony, unless the victim of the assault is under the age of fifteen, in which case the assault is a class 2 felony.

¶ 28 Relying on the Arizona Supreme Court's decision in *State v. Williams*, 175 Ariz. 98, 854 P.2d 131 (1993), Flannigan argues that it was simply fortuitous that passengers in the vehicle he struck were under the age of 15, and that it is therefore irrational to increase the felony classification for the aggravated assault solely because of this fact. In *Williams*, the court examined the application of the Dangerous Crimes Against Children statute, A.R.S. § 13-604.01, to offenses involving reckless conduct. The defendant in Williams was convicted of aggravated assault for recklessly causing physical injury using a dangerous instrument. *Id.* at 99, 854 P.2d at 132. *Williams*, like this case, involved a DUI accident resulting in injury to a child under the age of fifteen. *Id.* Reversing the trial court's application of the section 13-604.01 sentencing enhancement, the supreme court concluded that the defendant's reckless aggravated assault was not a "dangerous crime against children." Id. at 104, 854 P.2d at 137.

¶ 29 The court reasoned that the legislative history of the statute indicated "quite clearly that the enactment of § 13-604.01 was calculated to reach criminals who prey specifically upon children." *Id.* at 102, 854 P.2d at 135. Thus, to qualify as a dangerous crime against children, "the defendant's conduct must be focused on, directed against, aimed at, or target a victim under the age of fifteen." *Id.* at 103, 854 P.2d at 136. In *Williams*, because the defendant's recklessness in driving drunk was not "directed at or focused upon" the young victim, the court concluded that the offense was not a dangerous crime against children. *Id.* at 104, 854 P.2d at 137.

¶ 30 The state alleged that Flannigan's aggravated assault against the fourteen-year-old victim was a class 2 felony pursuant to A.R.S. section 13-1204(B), not that the offense was a dangerous crime against children pursuant to section 13-604.01. He argues that, because the age of his victim was a factor beyond his control, the reasoning of *Williams* should

similarly apply to preclude the trial court from sentencing him for a class 2, rather than a class 3, felony. We disagree.

¶ 31 As the court observed in *Williams*, "punishment can vary according to the severity of the consequences flowing from an individual's conduct as well as from the culpability of the conduct, and the legislature could consider harming a child, even fortuitously, more serious than harming an adult." 175 Ariz. at 103, 854 P.2d at 136 (emphasis added). The court noted that the legislature approved this reasoning by converting aggravated assault from a class 3 felony to a class 2 felony whenever the victim is under fifteen. *Id.*

¶ 32 Flannigan argues in response that "[t]here is no deterrent effect if his conduct is punished more severely based on chance." He may well be correct. Criminal punishment, however, is not imposed solely for its deterrent effect. To a limited extent, it also serves a retributive function. The legislature's decision to increase the felony classification for aggravated assaults upon victims under fifteen is consistent with a retributive theory of criminal punishment. See Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law, § 1.5(6), at 35-36 (1986). As the court observed in *Williams*, the legislature thus had a legitimate basis for classifying aggravated assaults upon victims under the age of fifteen as class 2, rather than class 3, felonies. We therefore reject his argument that the trial court erred in sentencing him for a class 2 aggravated assault. (FN5)

CONCLUSION

¶ 33 Because we conclude that the trial court erred in denying Flannigan's motion to suppress the blood test results, we reverse his convictions and remand this case to the trial court for further proceedings consistent with this decision.

FIDEL and GRANT, JJ., concur.

FN1. We view the facts underlying Flannigan's convictions in the light most favorable to sustaining the jury's verdicts. *State v. Atwood*, 171 Ariz. 576, 596, 832 P.2d 593, 613 (1992), cert. denied, 506 U.S. 1084, 113 S.Ct. 1058, 122 L.Ed.2d 364 (1993).

FN2. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

FN3. The record indicates that, despite the jury's findings of dangerousness as to all offenses, the trial court failed to impose the enhanced sentencing provisions of A.R.S. § 13-604(F) and (I). The state, however, did not cross-appeal from the sentence imposed, and we therefore do not address the propriety of those sentences in this decision. See *State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990).

FN4. We base our conclusion, as we must, solely on the record in this case. For cases applying similar fact-intensive applications of *Schmerber* in the context of cocaine/methamphetamine use and likewise finding no exigent circumstances, see *State v. Jones*, 111 Nev. 774, 895 P.2d 643, 644 (Nev.1995); *United States v. Pond*, 36 M.J. 1050, 1058-59 (U.S. Air Force Ct. of Military Rev.1993); *State v. Moylett*, 313 Or. 540, 836 P.2d 1329, 1335-36 (Oregon 1992).

FN5. Flannigan also argues that the trial court erred in permitting the state to cross-examine him concerning his prior use of both methamphetamine and a drug known as "Ecstasy." Because this issue is not likely to arise in a new trial we do not address it.

SUPREME COURT

NOEL K. DESSAINT
CLERK OF COURT

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 West Washington Street
Phoenix, Arizona 85007-3329

KATHLEEN E. KEMPLY
CHIEF DEPUTY CLERK

May 26, 1999

Telephone (602-542-9396)

RE: STATE OF ARIZONA VS. BILLY JOE FLANNIGAN
Supreme Court No. CR-98-0551-PR
Court of Appeals No. 1 CA-CR 97-0763
Maricopa County No. CR 95-90117

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 25, 1999, in regard to the above-referenced cause:

ORDERED: The State of Arizona's Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 26th day of May, 1999.

NOEL K. DESSAINT, Clerk

TO:
Hon. Janet Napolitano, Attorney General
ATTN: Paul J. McMurdie, Esq. and Gregory A. McCarthy, Esq.
Dean W. Trebesch, Maricopa County Public Defender
ATTN: Christopher Johns, Esq.
Billy J. Flannigan, #130892, Arizona State Prison-Winslow
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix
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IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Division One
Court of Appeals
State of Arizona
Filed: June 18, 1999

GLEN D. CLARK, CLERK

By: M. Soto

STATE OF ARIZONA, Appellee, v. BILLY JOE FLANNIGAN, Appellant.	)	1 CA-CR 97-0763 DEPARTMENT A MARICOPA County Superior Court No. CR 95-90117

ORDER AND MANDATE

Janet A. Napolitano, The Attorney General
By: Paul J. McMurdie, Chief Counsel, Criminal Appeals Section
and Gregory A. McCarthy, Assistant Attorney General
Attorneys for Appellee Phoenix

Dean W. Trebesch, Maricopa County Public Defender
By: Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant Phoenix

The opinion of this court in the above matter was filed on November 3, 1998.

The motion for reconsideration was denied and notice thereof was given on December 4, 1998. A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated May 26, 1999, the Arizona Supreme Court denied the petition for review, Supreme Court No. CR-98-0551-PR.

IT IS ORDERED in conformity with the opinion attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and MANDATE and a copy of the opinion of the Court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, on June 18, 1999. A copy of the ORDER and MANDATE and a copy of the opinion were mailed to the Honorable Mark F. Aceto, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party appearing or the attorneys of record; as well as the MARICOPA County Attorney.

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of Superior Court, all records, exhibits, and other matters received from said Clerk by this Court in aid of the consideration of this matter.

DATED June 18, 1999.

VICE CHIEF JUDGE

All of the foregoing directives were complied with June 18, 1999.

GLEN D. CLARK, Clerk
By

Marcos A. Soto
Deputy Clerk